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No. 130

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In the Supreme Court of the United States

OCTOBER TERM, 1964

RAILWAY LABOR EXECUTIVES' ASSOCIATION, G. E. LEIGHTY AND D. S. BEATTIE, APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

and

INTERSTATE COMMERCE COMMISSION, SOUTHERN RAILWAY COMPANY, AND CENTRAL OF GEORGIA RAILWAY COMPANY, INTERVENOR-APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

MOTION TO AFFIRM

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Pursuant to Rule 16, paragraph 1(c) of the Revised Rules of this Court, the Interstate Commerce Commission moves that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a judgment (J. S. 1a) of a three-judge district court dismissing appellants' complaint to set aside orders of the Interstate Commerce Commission entered in *Southern Railway Co.—Control—Central of Georgia Railway Co.*, 317 I.C.C. 557; 317 I.C.C. 729. The Commission's orders, entered pursuant to Section 5(2) of the Interstate Commerce Act (49 U.S.C. § 5(2)), authorized Southern to acquire control through stock ownership of Central of Georgia and imposed conditions, *inter alia*, for the protection of employees. This litigation involves only the labor protective conditions prescribed by the Commission.

The terms "Washington Agreement," "Oklahoma conditions" and "New Orleans conditions," as used in the Commission's reports, should be defined at the outset.[1] The Washington Job Protection Agreement of May 21, 1936, is a collective bargaining agreement between most of the railroads (including Southern and Central of Georgia) and railroad labor unions to be followed in the event of a "coordination," which is defined as joint action by two or more carriers to consolidate facilities, operations or services previously performed by them through separate facilites. Sections 4 and 5 of the Agreement require railroads to give 90 days notice of intended coordinations and to negotiate and, ultimately, to arbitrate the selection and assignment of employees made necessary by the coordination. Generally, it also provides that a railroad employee losing his job as a result of a coordination draws an allowance for up to five years equal to 60% of his earn-

[1] The text of these provisions is set forth in Exhibit A to the complaint filed below, and in Appendix Volume III, "Studies Relating to Railroad Operating Employees," Report of the Presidential Railroad Commission, pp. 173, 178, 183 (1962).

ings in the year prior to the loss of his employment, and other benefits. Section 9 of the agreement gives a dismissed employee an option to receive a lump sum separation payment.

Following the enactment of section 5(2)(f) of the Act in 1940,[2] the Commission evolved the so-called Oklahoma conditions in *Oklahoma Railroad Co.-Trustees Abandonment*, 257 I.C.C. 177, 197-201 (1944). Under the Oklahoma conditions, a dismissed employee receives protection measured by 100% of his base compensation for a period of four years from the date of the Commission's order approving the transaction. The Oklahoma conditions do not contain the equivalent of Sections 4, 5 and 9 of the Washington Agreement.

The New Orleans conditions were developed in *New Orleans Union Passenger Terminal Case*, 282 I.C.C. 271 (1952). In that case, the Commission was dealing with the problem presented upon remand from this Court's decision in *Railway Labor Executives' As-*

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[2] Section 5(2)(f), 49 U.S.C. § 5(2)(f), reads as follows:

As a condition of its approval, under this paragraph (2), of any transaction involving a carrier or carriers by railroad subject to the provisions of this part, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this Act, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees.

sociation v. *United States*, 339 U.S. 142 (1950), of providing benefits for employees adversely affected after the lapse of a substantial period of time from the effective date of the Commission's order. The New Orleans conditions does this by superimposing the Washington Agreement on the Oklahoma conditions as a minimum, with the result that any adversely affected employee who in the four year period from the date of the Commission's order has not received benefits equalling those provided by the Washington Agreement is entitled to such additional benefits as will give him the equivalent of the latter. As we point out hereafter, the New Orleans conditions incorporate the provisions of Sections 4, 5 and 9 of the Washington Agreement.

In its original report of November 7, 1962, in this proceeding, the Commission stated (J. S. 16a) that:

> It is our opinion that the protection afforded by the *New Orleans* conditions, modified in minor respects as hereinafter described, will more than meet the minimum requirements of section 5(2)(f) and will be fair and equitable to the employees and to the carriers involved in the transaction. In the past, these conditions have proved substantially acceptable to carriers and employees and have been upheld by the courts.

And again (J. S. 20a):

> We find that a fair and equitable arrangement for protecting the interests of the employees of the applicant and the Central and any of its subsidiaries who may be adversely affected as a result of the transaction herein approved will be provided by imposing the conditions set forth in appendix II hereof. These conditions conform

> substantially to the *New Orleans* conditions, with a modification, as hereinbefore indicated, in the provision respecting arbitration of disputes.

The modification referred to by the Commission was a new provision for arbitration of disputes (J. S. 24a) adopted in response to the appellants' contention that Southern had refused to arbitrate disputes arising out of prior transactions. Appendix II to the Commission's original report is entitled "Conditions for the benefit of employees of carriers," but does not set forth the text of Sections 4, 5, and 9 of the Washington Agreement.

In its original report, the Commission denied Southern's request for a holding that the labor protective conditions would not apply to employees adversely affected by internal technological improvements and economies occurring subsequent to the acquisition of control (J. S. 19a), and left this matter for arbitration.

Both appellants and Southern filed petitions for reconsideration of the Commission's original report and order of November 7, 1962, and these petitions were disposed of in the Commission's second report of June 10, 1963. Appellants' petition, which challenged the omission of Section 9 of the Washington Agreement, but raised no question as to the inclusion or exclusion of Sections 4 and 5 of that Agreement, was denied (J. S. 29a). However, in response to Southern's petition, the Commission stated that it would "for the guidance of arbitrators . . . clarify our intention as to the general scope of the protection intended to be afforded" (J. S. 30a). It then held (J. S. 33a):

> It is plain under the conditions that an employee would be entitled to benefits if adversely affected by a coordination of the operations of applicant and the Central or by the shifting of functions from

> one to the other. However, the effect of subsequent internal technological improvements by either of the carriers, even if made possible by improved financial circumstances partly attributable to the unification of control, is too indirect and remote to be considered a result of the transaction; and it is not our intention that employees affected by such internal improvements shall be entitled to the benefit of the conditions.

The Commission's second report and order of June 10, 1963, was served on Friday, June 14, 1963 (J. S. 4). Southern has conceded that "On the next business day, Monday, June 17, 1963, [Southern and Central of Georgia] accepted the conditions, consummated the transaction, and immediately carried out the planned elimination of Central's duplicate facilities and the selection and assignment of employees at Southern's facilities * * *."[3]

The Fifth Circuit Litigation. On June 21, 1963 (four days after Southern and Central consummated the transaction), various organizations of railroad employees brought suits in the United States District Court for the Northern District of Georgia seeking injunctive relief against Southern and Central upon the ground, *inter alia*, that their actions were violative of Sections 4 and 5 of the Washington Agreement. As Southern has pointed out, "If, at the time of consummation, Sections 4 and 5 of the Washington Agreement had been applicable, neither the elimination of duplicate facilities, the selection and assignment of forces at the Southern facilities, nor the payment of benefits to the affected employees would have been made

[3] Southern's brief dated July 15, 1964, and filed in *Southern Ry. Co. et al. v. United States et al.*, Civil Action No. 3276, United States District Court for the Eastern District of Virginia, p. 5.

until completion of the negotiations and arbitrations called for by those Sections."[4] Southern and Central filed answers in the Georgia suits contending, *inter alia*, that the labor protective conditions prescribed by the Commission (a) did not include Sections 4 and 5, and (b) superseded the terms of the Washington Agreement as a private contract.[5] District Judge Hooper on August 30, 1963, denied injunctive relief, without prejudice to a claim for money damages if the complaints were appropriately amended. Judge Hooper denied injunctive relief at least in part upon the ground that resolution of the question, "Does the Order of the Interstate Commerce Commission, supersede [the Washington Agreement] . . . would compel this Court to interpret and construe the Order of the Commission while a three-judge court in Virginia is now engaged not only in its interpretation and construction but also its validity." The appeal of the labor organizations to the Court of Appeals for the Fifth Circuit has been briefed and is awaiting oral argument.

The instant litigation. On July 9, 1963, the appellants commenced the instant suit in the Eastern District of Virginia, contending, *inter alia*, that the labor protective provisions prescribed by the Commission violated Section 5(2)(f) of the Interstate Commerce Act in that they failed to include the provisions of Sections 4, 5, and 9 of the Washington Agreement, and in that they did not apply to employees who might be affected by subsequent internal technological change. Both Southern and counsel for the Commission conceded that the prescribed conditions did not include

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[4] *Id.* at page 6.

[5] In the Georgia litigations, the complaint of the Switchmen's Union further contended that the conditions prescribed by the Commission included Sections 4 and 5 of the Washington Agreement.

Sections 4, 5 and 9 of the Washington Agreement, and contended that their inclusion was not required by Section 5(2)(f). In so contending, counsel for the Commission further contended that the so-called "New Orleans" protective conditions had not included Sections 4, 5 and 9 of the Washington Agreement. In view of the agreement of all of the contesting parties as to the meaning of the conditions, no issue as to their interpretation was presented to the Court below. The court below in its decision of January 31, 1964, rejected the appellants' contentions that in either respect the Commission had violated Section 5(2)(f) (J. S. 2a.)[6]

Approximately coincident with or shortly after the decision of the three-judge court in Virginia in this case on January 31, 1964, the Commission ascertained that its counsel had joined in the contention of appellants and of Southern that the conditions which the Commission had prescribed for the protection of adversely affected employees did not include the provisions of Sections 4, 5 and 9 of the Washington Agreement, and that this position of its counsel was not in accord with the Commission's intent and purpose in prescribing labor protective conditions in this case. Thereupon, the entire Commission, *sua sponte*, with three Commissioners dissenting, issued its Supplemental Report and Order of February 17, 1964, stating that (J. S. 39a-40a):

> Subsequent to the decision of the three-judge court, it came to the Commission's attention that counsel for the parties, including the Commission, had urged or acquiesced in certain interpretations of the conditions for the protection of employees

[6] The court below also resolved against appellants two other issues not presented in their appeal to this Court.

which are not in accord with the Commission's intent and purpose in prescribing them. Accordingly, we find it necessary, in fairness to all concerned, to clarify the situation.

It was and is our intention that the protection afforded the affected employees is not limited to the protection set forth in Appendix II, but that, as we stated in the first report, the protection afforded by the *New Orleans* conditions will be fair and equitable. 317 I.C.C. at 565-66. We thereby incorporated all the provisions of the *New Orleans* conditions, which embraced the provisions of the Washington Agreement, except as specifically modified in Appendix II.

It was our finding that employees adversely affected by the transaction in this proceeding were to be afforded the protection of all provisions of the Washington Agreement of May 21, 1936, which were not specifically modified by the provisions set forth in Appendix II of our original report. (317 I.C.C. at 588 *et seq.*).

Coincident with the issuance of the Commission's Supplemental Report and Order, the Commission's General Counsel addressed the following letter to the three-judge court below:

> Subsequent to this Court's decision, the Commission ascertained that its counsel had misinterpreted the conditions which the Commission had imposed for the protection of employees who might be adversely affected by the transaction. The Commission states in the Supplemental Report (p. 2) that its first report, referring to 317 I.C.C. at 565-566, "incorporated all the provisions of the *New Orleans* conditions, which embraced the provisions of the Washington Agreement, except as specif-

> ically modified in Appendix II [of the first report]." This means, for example, contrary to the position taken by Mr. Goodman and me as counsel for the Commission in brief and oral argument, that the conditions prescribed by the Commission in this proceeding embrace the procedural provisions of the Washington Agreement and the lump sum separation allowance provision of Section 9 of that Agreement.

Thereafter, this litigation became bifurcated, as follows: (1) the appellants took the instant appeal to this Court upon the grounds, (a) that the Commission's order was "imprecise, vague and confusing" as to whether its labor protective conditions included Sections 4 and 5 of the Washington Agreement, and (b) that it violated Section 5(2)(f) by failing to provide protection for employees adversely affected by subsequent internal technological change; and (2) Southern and Central filed a new three-judge court action in the Eastern District of Virginia challenging upon a variety of grounds the Commission's Supplemental Report and Order of February 17, 1964.

Factually, Southern and Central have asserted in their brief in their new three-judge court proceeding (footnote 3, *supra,* at p. 6):

> * * * In discharge of the obligations accepted by virtue of such consummation, plaintiffs paid, between that date [June 17, 1963] and the date of the Supplemental Order, approximately $34,000,000, of which about $4,000,000 was in connection with the employee benefits for Central employees specified in Appendix II; since the Supplemental Order, plaintiffs have been making regular payments of approximately $50,000 per month pursuant to such conditions. The planned elimina-

tions of duplicate facilities have been completed and the prescribed obligations to employees have been substantially discharged. Over 75 percent of the approximately 1300 employees affected by the transaction have been paid all benefits to which they were entitled under those conditions. More than $2,000,000 in lump-sum settlements has been paid, and approximately the same amount in monthly payments. Substantial additional sums have been expended in reimbursements for travel, moving expenses, sale of homes, and the like for several hundred employees who have been transferred to other locations. (Footnote omitted).

ARGUMENT

1. Appellants' principal contention is that the Commission's order authorizing Southern to acquire control through stock ownership of Central of Georgia is fatally defective in that the conditions which it prescribed for the protection of employees did not encompass with sufficient clarity the provisions of Sections 4 and 5 of the Washington Agreement with respect to notice and negotiation or arbitration as to the work changes involved in the authorized transaction.

We submit that there is no controversy between the appellants and the Commission, in that the Commission considers that its original report and order of November 7, 1962 (317 I.C.C. 557; J. S. 10a) incorporate into the prescribed labor protective conditions the provisions of Sections 4 and 5 of the Washington Agreement, such provisions to be applicable from the effective date of the Commission's order approving the transaction. Thus, when the Commission ascertained that the parties and counsel for the Commission had concurred in a contrary interpretation in

the court below, it issued its Supplemental Report and Order of February 17, 1964, stating (J. S. 40a):

> It was and is our intention that the protection afforded the affected employees is not limited to the protection set forth in Appendix II, but that, as we stated in the first report, the protection afforded by the New Orleans conditions will be fair and equitable. 317 I.C.C. at 565-66. We thereby incorporated all the provisions of the New Orleans conditions, which embraced the provisions of the Washington Agreement, except as specifically modified in Appendix II.
>
> It was our finding that employees adversely affected by the transaction in this proceeding were to be afforded the protection of all provisions of the Washington Agreement of May 21, 1936, which were not specifically modified by the provisions set forth in Appendix II of our original report (317 I.C.C. at 588 *et seq.*).

Since, as appellants state (J. S. 7), Sections 4 and 5 of the Washington Agreement were included in the "New Orleans" conditions, and since the Commission's original report adopted the New Orleans conditions, without any modifications of Sections 4 and 5, it follows that they were included in the protective conditions prescribed here.

While the appellants do not state the precise relief which they seek from this Court, it is presumably a remand to the Commission to say again that the protective conditions prescribed here include Sections 4 and 5 of the Washington Agreement. Such action by this Court and by the Commission would be superfluous. If the Commission's interpretation of its labor protective conditions is permissible (*Nelson, Inc.* v.

United States, 355 U.S. 554, 558-561 (1958)) then it follows that there is no controversy between the appellants and the Commission on this aspect of the case. Sustaining the Commission's interpretation likewise would remove from issue the appellants' further contentions, (1) that the asserted failure to include Sections 4 and 5 of the Washington Agreement violates Section 5(2)(f) of the Act, and (2) that this omission without "findings to support such a deprivation of protection" invalidates the order. We submit, therefore, that this appeal presents for decision the question of whether the labor protective conditions prescribed in the Commission's report and order of November 7, 1962, included the provisions of Sections 4 and 5 of the Washington Agreement.

There can be no serious question as to the Commission's *power* under Section 5(2)(f) to include in labor protective conditions incident to rail unifications the provisions or the equivalent of Sections 4 and 5 of the Washington Agreement, from which Section 5(2)(f) was derived. *United States* v. *Lowden*, 308 U.S. 225 (1939); *Railway Labor Executives Assoc.* v. *United States*, 339 U.S. 142, 146-150 (1950); *Brotherhood of Maintenance of Way Employes* v. *United States*, 366 U.S. 169, 173 (1961).[7] The only question is whether the Commission effectively expressed its purpose to do so.

In its report of November 7, 1962, the Commission stated that (J. S. 16a):

> It is our opinion that the protection afforded by the *New Orleans* conditions, modified in minor respects as hereinafter described, will more than meet the minimum requirements of section 5(2)(f) and will be fair and equitable to the employees and

[7] Conversely, we believe that the court below correctly held that Section 5(2)(f) does not require the Commission to include Sections 4 and 5 of the Washington Agreement in its prescribed conditions.

to the carriers involved in the transaction. In the past, these conditions have proved substantially acceptable to carriers and employees and have been upheld by the courts.

The association contends that certain "incidents" of employment are not adequately protected by the *Oklahoma* or *New Orleans* conditions. Specific reference is made to hospitalization, medical-surgical care, life insurance, and vacation rights. We do not agree. In our opinion, employees are fully and adequately protected with respect to these so-called incidents of employment, or fringe benefits, by paragraph 6 of the *Oklahoma* conditions, to which benefits an employee is entitled under the *New Orleans* conditions.

And again (J. S. 20a):

We find that a fair and equitable arrangement for protecting the interests of the employees of the applicant and the Central and any of its subsidiaries who may be adversely affected as a result of the transaction herein approved will be provided by imposing the conditions set forth in appendix II hereof. These conditions conform substantially to the *New Orleans* conditions, with a modification, as hereinbefore indicated, in the provision respecting arbitration of disputes.

The so-called "New Orleans" conditions originated in *New Orleans Union Passenger Terminal Case*, 282 I.C.C. 271 (1952), decided by the Commission upon remand from this Court's decision in *RLEA* v. *United States*, 339 U.S. 142 (1950). In *New Orleans*, the Commission stated (282 I.C.C. at 280, 281):

* * * From the beginning, we have patterned the conditions which we prescribed after the Washing-

ton Agreement. Since the enactment of section 5(2)(f), the conditions prescribed by us differed from that agreement as to when the protection afforded was to begin, the duration thereof, and the amount of the annual allowance to be made because all such matters were regarded as being fixed by the statute. Under the circumstances here present, some additional protection for the employees involved must be afforded. In our opinion the Washington Agreement, subject to the limitations later shown, would provide the fair and equitable arrangement contemplated by the statute.

* * * * *

Based upon the conclusions stated herein and consistent with the circumstances in this proceeding and in conformity with the decision of the Supreme Court of the United States in *Railway Labor Executives' Assn.* v. *United States, supra*, we find that a fair and equitable arrangement for protecting the interests of the employees adversely affected by the transaction herein will be provided by applying the terms of the Washington Agreement of May 21, 1936, subject to the following limitations or restrictions:

The limitations or restrictions referred to by the Commission modify the Washington Agreement in two respects not here relevant, and simply underscore the Commission's purpose to incorporate into the *New Orleans* conditions the provisions of the Washington Agreement (including Sections 4, 5 and 9) in all other respects.

Not only did the appellants understand the New Orleans conditions as including Sections 4 and 5 of the Washington Agreement (J.S. 7, 14), but so has the railroad industry. For example, in Finance Docket 21459,

Pennsylvania Railroad Company—Control—Lehigh Valley Railroad Company, 317 I.C.C. 139, 148-149 (1962), in which the Commission prescribed the New Orleans conditions, the applicant railroads filed on October 25, 1963 a Petition for Reopening, Further Hearing and Modification of Order, asserting that:

> . . . both the Pennsylvania and the Lehigh Valley have diligently followed the requirements of *Sections 4 and 5 of the Washington Agreement (incorporated in the New Orleans Conditions)** respecting notice and consultation with employee representatives concerning the intended changes and the rearrangement of forces made necessary thereby.

---

* In the *New Orleans Union Passenger Terminal Case, supra*, the Commission concluded and found (282 ICC at 281):

> "'. . . In our opinion the Washington Agreement, subject to the limitations later shown, would provide the fair and equitable arrangement contemplated by the statute.
>
> ". . . We find that a fair and equitable arrangement for protecting the interests of the employees adversely affected by the transaction herein will be provided by applying the terms of the Washington agreement of May 21, 1936, subject to the following limitations or restrictions:"

The principal "restriction" on the Washington Agreement is the imposition of the more liberal compensatory provisions of Conditions 4 through 9, inclusive, in *Oklahoma Railway Company Trustees Abandonment*, 257 ICC 177, for employees to be affected within four years from the date of the

Order. Subject to that minimum, *all of the procedural* and monetary benefits of the Washington Agreement were preserved for the protection of all employees affected by the approved transaction, irrespective of their union affiliation or status under the Washington Agreement otherwise. (Emphasis supplied).

Between the Commission's original report and order of November 7, 1962, and the lower court's decision of January 31, 1964, the Commission prescribed labor protective conditions in two major rail unifications which it authorized pursuant to Section 5(2). In *Chesapeake & Ohio Ry. Co.—Control—Baltimore & Ohio Ry. Co.*, 317 I.C.C. 261 (decided December 17, 1962), the Commission discussed and prescribed labor protective conditions, as follows (317 I.C.C. at 288-289):

It is our opinion that the protection afforded by the *New Orleans* conditions, as modified in the *Southern Control* case, *supra*, will more than meet the minimum requirements of section 5(2)(f). In effect, the *New Orleans* conditions superimpose upon the *Oklahoma* conditions (*Oklahoma Ry. Co. Trustees Abandonment*, 257 I.C.C. 177) the provisions of the Washington Agreement, the protection of the *Oklahoma* conditions to be applied as a minimum. As we stated in the *Southern Control* case, the *New Orleans* conditions "were imposed for the specific purpose of giving protection to those employees who knowingly were not to be adversely affected in their employment until a substantial period elapsed after the date of the order authorizing the transaction and who otherwise would have received little or no protection under the *Oklahoma* conditions." The conditions prescribed in the *Southern Control* case conform

substantially to the *New Orleans* conditions, with a modification in the provision respecting the arbitration of disputes. In the *Southern Control* case, we adopted an arbitration clause which makes mandatory the submission to binding arbitration of disputes not settled by agreement between the carrier and the employee. * * *

As thus modified in the *Southern Control* case, the *New Orleans* conditions will be fair to the affected employees and to the carriers involved in the transaction. In the past, these conditions have been acceptable to employees as well as carriers. It is observed that many of the provisions specifically requested by the association are similar to, or based upon language used in the Washington Agreement. * * *

. . . . . .

We find that a fair and equitable arrangement for protecting the interests of the employees of the applicant and the B & O and any of their subsidiaries who may be adversely affected as a result of the transaction herein approved will be provided by imposing the conditions set forth in appendix VIII hereof. These conditions are the same as those imposed in the *Southern Control* case.

The appendix VIII referred to by the Commission in *C&O—B&O* is identical with Appendix II to its original report in *Southern—Central of Georgia*. The Commission's permissive order in *C&O—Control—B&O* was challenged by appellant RLEA and other organizations (and by the Department of Justice) in the Eastern District of Michigan in *Brotherhood of Maintenance of Way Employes* v. *U.S., I.C.C. et al.* The order was

sustained by a three-judge court, 221 F. Supp. 19, affirmed per curiam by this Court in 375 U.S. 216 (1963), without any challenge to the content of the labor protective conditions which the Commission had prescribed in terms of reference to the instant *Southern—Central of Georgia* proceeding.

Again, in *Seaboard Air Line Railroad Co.—Merger—Atlantic Coast Line Railroad Co.*, 320 I.C.C. 122 (decided December 2, 1963), the Commission dealt with the protection of adversely affected employees of the applicant railroads, in pertinent part as follows (320 I.C.C. at 203-204):

> * * * we will impose the *New Orleans* conditions (*New Orleans Union Passenger Terminal Case*, 282 I.C.C. 271), as modified in the *Southern—Control—Central of Georgia* case, and subsequently applied in the *C&O—B&O Control* case. As discussed in the *Southern Control* case, the major modification of the *New Orleans* conditions provided for therein was the adoption of an arbitration clause which makes mandatory the submission to binding arbitration of disputes not settled by agreement between the carrier and the employee. In effect, the *New Orleans* conditions superimpose upon the *Oklahoma* conditions the provisions of the Washington Agreement, the protection of the Oklahoma conditions to be applied as a minimum. Section 9 of the Washington Agreement substantially embodies the condition which the association seeks, with respect to a lump-sum separation allowance, and nothing herein shall be construed to abrogate the provisions of that section. Further, we find that the *Oklahoma* conditions alone, if imposed in this instance, would be com-

pletely sufficient to make equitable provision for all fringe benefits for affected employees.

* * * * *

We find that a fair and equitable arrangement for protecting the interests of the employees of the applicants and their subsidiaries who may be adversely affected as a result of the transaction herein approved will be provided by imposing the conditions set forth in the *Southern—Control—Central of Georgia* and in the *C&O—B&O Control* cases. (See Articles I and II of appendix II in *Southern Ry. Co.—Control—Central of Georgia Ry., supra.*) * * *

The Commission's order authorizing the Seaboard Coast Line merger has been challenged before a three-judge court in *Florida East Coast Railway Co., et al.* v. *United States, et al.*, Civil Action No. 64-64-Civ.-J, Middle District of Florida, and, following briefs and oral argument, is pending decision. The appellant R.L.E.A. intervened in the suit and challenged the labor protective conditions as failing to include Sections 4, 5 and 9 of the Washington Agreement. Both in brief and in oral argument in that case, Seaboard and Coast Line stated that "contrary to the contentions of R.L.E.A., the conditions imposed by the Commission specifically include the provisions of Sections 4, 5 and 9 of the Washington Agreement as sought by R.L.E.A. Except for a new provision relating to arbitration of disputes (which was advocated by R.L.E.A.), the conditions imposed by the Commission in this case differ in no material respect from those which have been customarily used for many years in railroad mergers and consolidations. * * *"

Nothing in the Commission's report of November 7,

1962, in the present case suggests that the Commission intended a major and unexplained departure from the protective conditions which it had imposed in other railroad merger cases, as understood by both rail labor and management, including Sections 4 and 5 of the Washington Agreement. By contrast, the one specifically intended change in the provision for the settlement of disputes by arbitration, was discussed by the Commission in detail (J.S. 16a-17a, 29a-30a.)

However arguable it may be that the Commission would be required to state affirmative findings and justification for *omitting* significant provisions of the Washington Agreement, surely there is no requirement of such findings to justify *inclusion* of conditions (Sections 4 and 5 of the Washington Agreement) which were formulated by rail labor and management in collective bargaining in 1936 as just and reasonable. *St. Louis & Iron Mountain Ry.* v. *Taylor*, 210 U.S. 281 (1908); *United States* v. *Lowden*, 308 U.S. 225, 234-35 (1939).

That the appellants apparently misunderstood the Commission's purpose and resorted to Federal courts in Georgia to enforce Sections 4 and 5 of the Washington Agreement as a private contract, cannot preclude giving effect to the Commission's stated purpose of prescribing the New Orleans conditions (including Sections 4 and 5 of the Washington Agreement) with modifications. Similarly, the Commission's purpose to protect adversely affected employees is not to be defeated by informal interpretations by members or employees of the Commission or by its counsel's agreement with the contrary interpretation of both appellants and Southern. *Minneapolis R.R.* v. *Peoria Ry.*, 270 U.S. 580, 585 (1926) (involving a telegram from a member of the Commission); *Thompson* v. *Texas Mexican R. Co.*, 328 U.S. 134, 145-146 (1946) (a letter

from the Commission's Secretary); and see *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 348; *Wolinsky* v. *United States*, 271 F. 2d 865, 868 (2d Cir. 1959).

The context for determining the general importance of the appellants' principal contention discussed above is this: for railroads involved in a merger or other type of rail unification, it is of little or no consequence whether they are bound to honor the notice and negotiation provisions of Sections 4 and 5 of the Washington Agreement as a matter of private contract or as included in the conditions prescribed by the Commission pursuant to Section 5(2)(f). Southern is unique, so far as we know, in contending that it was not subject to Sections 4 and 5 of the Washington Agreement, (1) on the theory, which it asserts in the present litigation, that the Commission did not include Sections 4 and 5 of the Washington Agreement in the protective conditions which it prescribed, *and* (2) on the theory, equally essential to Southern's position, and which it is now asserting in the Fifth Circuit, that the Commission's prescription of conditions supersedes the Washington Agreement as a matter of law by reason of Section 5(11) of the Interstate Commerce Act (49 U.S.C. 5(11))[8] even though the Commission in its original report indicated no purpose to supersede the Agreement as a private collective bargaining agreement, and, in its

[8] Section 5(11) reads as follows:

The authority conferred by this section shall be exclusive and plenary, and any carrier or corporation participating in or resulting from any transaction approved by the Commission thereunder, shall have full power (with the assent, in the case of a purchase and sale, a lease, a corporate consolidation, or a corporate merger, of a majority, unless a different vote is required under applicable State law, in which case the number so required shall assent, of the votes of the holders of the shares entitled to vote of the capital stock of such corporation at a regular meeting of such stockholders, the notice of such meeting to include such purpose, or at a special

Supplemental Report of February 17, 1964 (J.S. 40a), specifically disavowed any such purpose. Thus, while the issue raised by the appellants may be important to Southern Central and some of their employees, it is and will be of no importance in other rail unifications unless other rail managements adopt Southern's unique dual position.

We submit, therefore, that on this phase of the case the Court should affirm summarily on the stated ground that the Commission has properly interpreted its labor protective conditions as incorporating the provisions of Sections 4 and 5 of the Washington Agreement.

2. The remaining question presented by this appeal is whether Section 5(2)(f) of the Act required the Commission to provide protection for employees of the railroads who were adversely affected, not as the result of a consolidation of facilities or operations inherent in the transaction authorized by the Commission, but by internal technological change or "modernization of facilities" occurring subsequently to the transaction authorized by the Commission. The entire Commission stated in its Report on Reconsideration (J. S. 33a) that:

> the effect of subsequent internal technological improvement, by either of the carriers, even if

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meeting thereof called for such purpose) to carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction without invoking any approval under State authority; and any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are hereby relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction. * * *.

made possible by improved financial circumstances partly attributable to the unification of control, is too indirect and remote to be considered a result of the transaction; and it is not our intention that employees affected by such internal improvements shall be entitled to the benefit of the conditions.'

We submit that there is no basis for construing Section 5(2)(f) as requiring a contrary result.

We recognize the growing national concern with the displacement of labor by automation and other forms of technological change. The simple historical fact, however, is that Section 5(2)(f) of the Interstate Commerce Act does not, and was not intended to, deal with the adverse effects upon employees of technological changes occurring subsequent to a railroad unification. On its face, Section 5(2) as a whole is concerned only with the consequences of carrier unifications. As noted above, Section 5(2)(f) has its roots in the Washington Agreement of 1936 which, upon its face, was concerned only with "those changes in employment in the Railroad industry solely due to and resulting from such coordination," *i.e.*, a consolidation of facilities or operations. Not a word in the legislative history of Section 5(2)(f) (enacted as a part of the Transportation Act of 1940) suggests that it was intended to require protection of railroad employees adversely affected by

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[9] The Commission in its original report refused to discuss "the scope of the protection intended by the statute" and concluded that the scope of the basic protection was to be left to arbitrators. (J.S. 19a-20a). It may have been legal error to have refused to set forth basic guides for the arbitrators. Cf. *Western Airlines* v. *Civil Aeronautics Board*, 194 F. 2d 211 (9th Cir. 1952); *N.L.R.B.* v. *Guy F. Atchison Co.*, 195 F. 2d 141 (9th Cir. 1952). In any event, the Commission on reconsideration recognized that its refusal to decide the basic scope of the mandatory protection under the statute left the arbitrators without sufficient guidelines within which to proceed. (See J.S. 30a, 35a).

internal technological change—even though such change may have been made possible by the savings resulting from a prior rail unification. When the appellants' instant contention has been made, it has been rejected, *Florida East Coast Ry. Co. Reorganization*, 307 I.C.C. 5, 20-21 (1958), with judicial approval, *In re Florida East Coast Ry. Co.*, 171 F. Supp. 512, 518-520 (S.D. Fla., 1959).

Whether and to what extent the protections contemplated by Section 5(2)(f) should be made applicable to railroad employees adversely affected by internal technological change, whether or not occurring after a rail unification, is a matter which, in the Commission's view, should be determined by the Congress or in collective bargaining. Of course, as the Court below noted (J. S. 8a), disputes as to whether the adverse effect upon particular employees is the result of the unification authorized by the Commission or of subsequent internal technological improvement are to be determined by arbitration under Section 6 of Article I in Appendix II to the Commission's original report (J. S. 24a).

CONCLUSION

The judgment below should be affirmed, in part upon the stated ground that the conditions prescribed by the Commission for the protection of employees incorporate Sections 4 and 5 of the Washington Agreement.

Respectfully submitted,

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